BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SHAWNA MARIE SAYRE Claimant VS. **SUNSET MANOR, INC.** Respondent AND **FIRSTCOMP INSURANCE CO.** Insurance Carrier	)	Docket No. **1,033,700**

ORDER

Claimant requests review of the December 21, 2007 preliminary hearing Order entered by Administrative Law Judge Kenneth J. Hursh.

ISSUES

The Administrative Law Judge (ALJ) found that claimant failed to prove by a preponderance of the credible evidence that she injured her back in a work-related accident on January 8, 2007, nor that she provided timely notice of that alleged accidental injury. The ALJ further determined claimant failed to meet her burden of proof that she suffered an accidental injury on March 8, 2007, nor in a series of repetitive traumas from January 8, 2007, continuing through each and every day worked.

Claimant requests review of whether the ALJ erred in finding claimant did not meet with personal injury by accident arising out of and in the course of her employment.

Respondent argues the ALJ's Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

The claimant alleged she injured her low back on January 8, 2007, while assisting a patient pull on his pants. Claimant testified that she reported the incident to her

supervisor that same day. Claimant's supervisor denied she reported she suffered a back injury at work.

Claimant did not seek medical treatment after her alleged injury but instead requested all the overtime she could obtain by working extra shifts. Eventually, claimant did go to the Mount Carmel Regional Medical Center emergency room on January 28, 2007, for back pain and reported a 20 year history of a bulging disk and that her pain worsened after working. But she denied she had suffered an injury.[1]

On March 7, 2007, claimant returned to Mount Carmel for back pain. The record of that visit noted that claimant fell on ice two days before the pain started. Claimant denied that she had fallen on the ice.

On March 8, 2007, claimant met with Kevin Knaup, respondent's administrator, and Kimberly Schlup, who processes all of respondent's workers compensation claims. Claimant requested medical treatment for a work-related back injury which she said had occurred a month or two ago. Although her claim was processed claimant was told that the insurance company would likely deny it for failure to provide timely notice. Claimant became upset and left the meeting.

The following morning Mr. Knaup discovered, under his door, an accident report form from claimant alleging she had hurt her back on March 9, 2007, while lifting a patient. Claimant admitted that she provided Ms. Schlup a smart-aleck note that she had got hurt again and "I guess they thought my back would be better since yesterday."[2]

The ALJ analyzed the evidence in the following fashion:

> Concerning the alleged injury of January 8, 2007, the claimant says an injury occurred, but the fact that she did not request treatment for the supposed injury until two months later, and voluntarily worked longer hours following the alleged injury, tends to indicate there was no injury. Furthermore, according to Mizer, Schlup and Knaup, the claimant never mentioned the supposed January 8 injury until two months later. The claimant said she told Mizer about the injury on January 8, but the court has doubts about the claimant's credibility.
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> The alleged March 8 [sic] accident, reported mere hours after the claimant was informed that her January 8 claim would be denied for late notice, appears by its very timing to be a fabrication. Plus, an emergency room record from the day before described a history of back pain related to a kidney infection and a fall on the ice.

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[1] P.H. Trans., Resp. Ex. 2.

[2] *Id.*, Resp. Ex. 4.

> The claimant failed to prove by a preponderance of credible evidence that she injured her back in work related accidents on either January 8 or March 8[sic], 2007. The claimant failed to prove by a preponderance of credible evidence that she reported the alleged January 8 injury within 10 days as required by K.S.A. 44-520.
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> The claimant also alleged that her back injury was the result of repetitive job duties from January 8, 2007 and continuing. The day after she reported the specific injury of March 8[sic], she filed an application for hearing for an injury "each and every working day beginning on or about January 8, 2007 and continuing." It was inconsistent for the claimant to allege a repetitive injury occurring at no discernible time, while at the same time claiming she was injured in two specific incidents. And again, there were two non-work related causes for the claimant's back pain in her emergency room record from March 7. Simply, there are too many different stories going on, here. The hearing record did not credibly support a repetitive back injury, either.[3]

The undersigned Board Member agrees and affirms. It should be noted the sequence of events in March included the meeting on March 8, 2007, and the alleged accident on March 9, 2007, instead of March 7, 2007, and March 8, 2007, respectively as indicated in the ALJ's Order. And the claimant signed the E-1 application for hearing on March 9, 2007, the same day as her alleged second injury but the application only alleged injury "each and every working day beginning on or about January 8, 2007 and continuing" as noted by the ALJ. The application for hearing did not mention a specific second traumatic injury on March 9, 2007.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[4] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[5]

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge Kenneth J. Hursh dated December 21, 2007, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of March 2008.

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[3] ALJ Order (Dec. 21, 2007) at 2-3.

[4] K.S.A. 44-534a.

[5] K.S.A. 2007 Supp. 44-555c(k).

HONORABLE DAVID A. SHUFELT
BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Ronald J. Laskowski, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge